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## The presumption of non-conformity in European consumer sales law

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## SUMMARY

According to the European legislator, in order to deepen the integration of the internal market, a high and equal level of consumer protection is required throughout the EU. To boost consumer participation in cross-border transactions, the European legislator required harmonisation of the provisions regarding the liability for the delivery of non-conforming goods. The Consumer Sales Directive provides for minimum requirements in consumer protection and Member States must ensure consumers are equipped with sufficient tools to stand up to the professional seller in case of the delivery of non-conforming goods. The Directive aimed to provide a cohesive notion of non-conformity and equal remedies applicable in case of delivery of non-conforming goods.

The substantive rights that the consumer can invoke against the professional sellers have their origins in the Consumer Sales Directive and are equal for consumers across the EU. However to be able to invoke these rights, the consumer must prove the essential facts on which he relies claiming the applicability of a particular right. The burden of proof is an essential factor in resolving civil law disputes. In general, following the classic rule on the allocation of the burden of proof in order to be able to receive remedies for the non-conforming goods the consumer would have to prove the existence of the non-conformity at the time of delivery. The European legislator decided that this sort of allocation of the burden of proof is too hard on the consumer and, alongside to the rules determining substantive issues, enacted a provision simplifying the consumers' duty to provide evidence in order to receive the remedies for the delivery of non-conforming goods. Article 5 (3) of the Consumer Sales Directive provides that if the non-conformity appears within six months from the time of delivery, the goods are presumed not to be in conformity at that time, unless this presumption is incompatible with the nature of the goods or the nature of the non-conformity.

This dissertation investigates how the presumption of non-conformity of Article 5 (3) of the Consumer Sales Directive has been implemented in the national laws of Poland, Germany, England and Wales and the Netherlands. The questions which take the central place in the discussion are: what is the construction of the presumption of non-conformity and what is its desired application, whether the national implementations provide for the simplification of duty to supply evidence as designed and expected by the European legislator, whether the investigated Member States provide for uniform application of the presumption, ensuring for equal level of consumer protection. To be able to give answer to the above questions, the matter of the burden of proof as such must be briefly analysed.

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Furthermore, to determine the application of the presumption of non-conformity, the detailed analysis of the notion of non-conformity is required.

**Chapter two** provides an overview of the rules and theories regarding the burden of proof. They are discussed separately for each jurisdiction, Poland, Germany, England and Wales and the Netherlands. The short analysis of rules concerning the issues of the burden of proof demonstrates specific characteristics of these rules, their role in litigation and importance for the outcome of the dispute, as well as their potential effect on the application of substantive law in general, and consumer law in particular. The information included illustrates what the national approach towards the issues of the burden of proof is, what the function of the burden of proof in litigation is and what the practices of the court and the parties to the proceedings are in the context of the burden of proof. The discussion in chapter two concerns the character of the rules on the burden of proof as belonging to either substantive or procedural law, the issues of the allocation of the burden of proof, including general rules of the burden of proof and possible exceptions. In this context, the application of legal presumptions and factual (judicial) presumptions is presented. How the presumptions influence the allocation of the burden of proof, how they affect the position of the parties and how they can be rebutted is also explained. This analysis is important in order to be able to compare what the ordinary allocation of the burden of proof is in the jurisdictions investigated and how the burden is allocated in cases when the presumption, in particular, the presumption of non-conformity applies. Ultimately, a short analysis of the above-mentioned issues is necessary in order to be able to establish whether in cases where the presumption of non-conformity applies, the burden of proof is distributed in accordance with the European legislator's expectations. Finally, the role of the court in taking/hearing of evidence, standard of proof and the assessment of evidence is discussed. The topics of the standard of proof proved to cause some uncertainty. Considering the differences that exist between jurisdictions in dealing with this matter there is a possibility that due to the various standards of proof and the (lack of) activity of a court when hearing evidence, what in one jurisdiction may be regarded as proven may in another jurisdiction and under similar circumstances be considered as unproven. The reasons for this may be a particularly high standard of proof or the court's (in)activity in the process of taking/hearing of evidence.

**Chapter three** provides general information on the Consumer Sales Directive and its implementation in Poland, Germany, England and Wales and the Netherlands. It briefly presents how the Directive came into being and describes its main aims and objectives. It also provides a short characterisation of the most important provisions of the Consumer Sales Directive. Subsequently, chapter three describes the implementation process of the Consumer Sales Directive in four Member States. The topics of national consumer sales

laws are presented separately for each jurisdiction. Chapter three describes the methods of implementation used in the jurisdictions investigated and presents the most important characteristics of the implementing acts. It discusses current problems and the most important developments related to transposition, application and execution of consumer sales law. It includes an analysis of national legislation on sales law and presents the legislative changes that result from the implementation of the Consumer Sales Directive. Particular attention is paid to the systems of liability for defective/non-conforming goods applicable in the four jurisdictions. Additionally, Chapter three presents the most important current developments in the consumer sales regarding the substantive and procedural issues, including topics on the consumer ADR. It investigates the most recent legislation changes in consumer sales law related to the implementation of the Directive on Consumer Rights. In this context, Polish and English and Welsh amendments of consumer (sales) law provide significant changes. These two Member States used the implementation process of the Directive on Consumer Rights to introduce substantive changes to consumer sales law. The Polish legislator promulgated the new statute in May 2014 and the amended provisions entered into force on 25 December 2014. The English amendment process has taken more time. At present, the proposed changes are under revision in the House of Lords. The proposed amendments will be most probably promulgated in the first half of 2015.

The analysis of issues surrounding the national sales law and implementation of the Consumer Sales Directive in Poland, Germany, England and Wales, and the Netherlands allows for the determination of whether the general goals of the European legislator, in the context of the harmonisation of the consumer sales law and providing a high level of consumer protection, have been achieved. The analysis of the issues regarding consumer sales law shows that the Member States investigated implemented the Directive correctly, using different methods of implementation. The implementing acts were often affected by time pressure, political interests, advisory and lobby groups and other Member States.

**The notion of non-conformity (Chapter four)** is one of the most crucial concepts of the Consumer Sales Directive. First of all, the sellers' liability for the delivery of non-conforming goods depends on the existence of non-conformity at the time of delivery. Second of all, the application of the presumption of non-conformity, reducing the consumers' duty to prove the existence of non-conformity at the time of delivery, depends on the successful proof of the existence of non-conformity at the time of the dispute. Chapter four deals with the issues of non-conformity of consumer goods according to the Consumer Sales Directive and its national implementations. Attention is also given to the issues of the burden of proof regarding the existence of non-conformity. An effort is made to explain the practical effects of the Directive's presumptions contained in Article 2 (2) of the Directive. Chapter four starts with a brief description of the criteria of non-conformity

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contained in Article 2 (2) (a)-(d) of the Directive, namely correspondence to the description of goods given by the seller, fitness for particular purpose, fitness for common purpose and correspondence to normal qualities of goods of the same kind and the qualities that the consumer is reasonably entitled to expect based on the public statements. Reference is also made to incorrect installation, which is provided in Article 2 (5) of the Directive and whose existence is deemed to be equivalent to the lack of conformity of goods. Subsequently, chapter four discusses how Article 2 (2) of the Consumer Sales Directive has been implemented in national legislation. It examines whether the national definitions of the non-conformity (defects, satisfactory quality and fitness for purpose) are in line with Article 2 (2) of the Directive. Each criterion of the non-conformity according to the Directive is investigated. The definitions of the non-conformity applicable in various Member States are compared in order to determine whether the national consumer sales law provides a uniform notion of non-conformity. The notion of the non-conformity as provided in the Directive is explained separately for each jurisdiction. Each section regarding the national understanding and interpretation of the non-conformity takes into consideration the national traditions and practices. The comparison of the notion of non-conformity in the four jurisdictions is particularly challenging as different jurisdictions use different notions to describe similar legal constructions, for example physical defects, material defects, legal defects, etc.

The Polish legislator introduced the notion of non-conformity to contracts of sale concluded between a consumer and a professional alongside the traditional notion of defects which remained applicable to contracts of sale concluded between professionals, and between consumers. Consequently, there were initially three systems of liability, the liability for non-conformity, based on the Consumer Sales Directive implemented in the Consumer Sale Act, traditional liability for defects as provided in the Civil Code and the system of liability applicable to the international sales of goods based on the CISG. The recent amendments repealed the provisions on the non-conformity and incorporated the consumer sales law into the Civil Code.

The German legislator did not implement the notion of non-conformity. It uses the traditional notion of physical and legal defects, but only when physical defects can be identified with the criteria of non-conformity from the Directive. The notion of defects has been modernised according to the Directive and elements as correspondence with the purpose of the goods or correspondence with the statements contained in the advertisements have been included. After analysing the German notion of defects and comparing it to the European notion of non-conformity it may appear that the first lacks some criteria of non-conformity. However, upon closer inspection it would appear that the interpretation of German law in light of the Directive will solve the question of 'lacking' criteria. The German legislator did not follow the European legislator and did not implement 'presumptions' simplifying the burden of proof of the existence of non-conformity. The consumer to is

required to provide the facts corresponding to the criteria of § 434 BGB, which contains the definition of defects, in order to receive remedies.

The English legislator introduced the definition of non-conformity for the purpose of consumer sales law. However, in practice the notion of non-conformity does not play an important role. The traditional English law concept of implied terms regarding satisfactory quality and fitness for purpose regulated in sections 13-15 of the Sale of Goods Act 1979 prevails over the non-conformity. On the other hand, the implied terms of satisfactory quality and fitness for purpose is used to explain the notion of non-conformity. Namely, the non-conformity is defined as a breach of the express term of the contract or a breach of one of the implied terms from sections 13-15 of the Sale of Goods Act 1979. The notion of satisfactory quality and fitness for purpose regards only material characteristics of goods. It applies in the context of the traditional English remedies: right to reject and damages (also termination and specific performance), where the notion of non-conformity in principle applies to the statutory (consumer) remedies: repair, replacement, rescission of contract, price reduction. The consumer has a choice between two sets of remedies. The analysis of satisfactory quality and fitness for purpose shows that the criteria of non-conformity contained in the Directive are mostly met, however there is uncertainty over their exact scope. The new provisions of the Consumer Rights Act to be enacted in 2015 provide for a more comprehensive explanation of implied terms and seem to clarify some of the issues. However, the coexistence of two notions: non-conformity and satisfactory quality and fitness for purpose has not been resolved. The Consumer Rights Act provides newly amended consumer remedies, which unfortunately do not seem solve the problem of two sets of remedies available to consumers.

In the Dutch law, the notion of non-conformity existed long before the promulgation of the Consumer Sales Directive. To ensure a level of consumer protection conforming to the Directive, the Dutch legislator introduced several minor amendments regarding the criteria of non-conformity. Article 17 (2) BW states that the delivered goods are not in conformity with a contract if they do not possess the characteristics which the buyer was entitled to expect under the contract, taking into account the nature of the goods and the statements about the goods made by the seller. The notion of non-conformity applies only to the physical state of the goods. The comparison between the criteria of non-conformity from the Directive the criteria found in the Dutch Civil Code causes some uncertainty. In the end it must be said that the Dutch notion corresponds to the definition from the Directive and provides for a consumer-friendly notion of non-conformity.

Chapter four also analyses issues relating to the consumer's knowledge of the non-conformity and its consequences. It provides information regarding national rules on the burden of proof of the existence of non-conformity, including a short discussion regarding the role of 'presumptions' as provided in Article 2 (2) of the Consumer Sales Directive.

**Chapter five** presents the presumption of non-conformity of Article 5 (3) of the Consumer Sales Directive, which determines a specific rule on the allocation of the burden of proof regarding the existence of non-conformity. Chapter five discusses the conditions for the application of the presumption of non-conformity, the existence of non-conformity within a six-month period from the time of delivery, and the legal consequences of the application of the presumption. Furthermore, the issues of the rebuttal of the presumption are dealt with. Finally, chapter five analysis the application of the criteria for the exclusion of the presumption, the incompatibility with the nature of the goods and the nature of the non-conformity. Chapter five analyses how the presumption of non-conformity is constructed, and whether it has been correctly implemented in the national systems of Poland, Germany, England and Wales and the Netherlands. Subsequently, it discusses whether the presumption of non-conformity achieves the aims for which it has been enacted and whether it is a suitable tool for achieving these aims. The first part of chapter five approaches the above-mentioned questions from the perspective of the Consumer Sales Directive. It analyses Article 5 (3) of the Directive and provides general information regarding the presumption of non-conformity, its origin, functions, and objectives. It also includes the detailed construction of the presumption of non-conformity accompanied by an example and it discusses possible outcomes depending on the successful supply of evidence regarding various facts.

In the latter part, the approach towards the presumption of non-conformity taken in Poland, Germany, England and Wales and the Netherlands is analysed. In each jurisdiction, the description of the presumption of non-conformity begins with the conditions for the application of the presumption and the existence of non-conformity within six months from the time of delivery. It continues with the options for the rebuttal of the presumption. Finally, it discusses the criteria for the exclusion of the presumption of non-conformity, the incompatibility with the nature of the goods and incompatibility with the nature of the non-conformity.

In Polish law, the presumption of non-conformity was initially implemented in the Consumer Sale Act, outside the Polish Civil Code. Article 4 (1) of the Consumer Sale Act stated that if the non-conformity became apparent within six months from the time of delivery, it is presumed to exist at that time. The amendments introduced in 2014 repealed the above-mentioned Act and incorporated the provisions on consumer sales law in the Civil Code. The main objective of the presumption of non-conformity is to support the buyer's position with regard to evidence. The new provision of Article 556<sup>2</sup> of the Civil Code governing the presumption states that if the defects become apparent within one year from the time of passing of risk they are presumed to have existed at that time. The time for the application of the presumption has been extended considerably increasing the level of protection. Taking into account the detailed rules concerning the criteria of non-conformity/defects, in cases of external defects in new products the burden of proving

the existence of non-conformity is usually easy to satisfy. The case law also confirmed that in cases of complex, electronic goods, the consumer is not required to point out the exact element of the device which is defective and which causes the non-conformity of the device. The duty to establish the above lies with the seller, who can use technical means, know-how and experience to determine the origins of the malfunction. The seller can rebut the presumption of non-conformity by proving that the goods lacked non-conformity at the time of delivery or that the non-conformity occurred only after the delivery of goods, for example as a result of the consumer's or a third party's fault, or by accident. The Polish legislator did not implement the criteria for an exclusion of the presumption. In theory, the presumption can apply even if it is incompatible with the nature of the goods or the nature of the non-conformity. In practice, it seems that arguments used in other jurisdictions for the exclusion of the presumption can be used in Poland as arguments for the rebuttal. This proves a very close connection between the successful proof as to the existence of non-conformity, the (un)successful proof to the contrary, and the exclusion criteria.

The German legislator implemented the presumption of non-conformity in § 476 BGB, which states that if a material defect becomes apparent within six months from the time of the passing of risk, it is presumed that the defects existed at the time the risk was passed. The German legislator justifies the wording and purpose of § 476 BGB by pointing out that the professional seller is at an advantage in terms of expertise, know-how and experience in comparison to the consumer and is better placed to supply evidence that the goods were not defective at the time the risk was passed. To be able to invoke the presumption of non-conformity, the consumer must first prove the existence of defects. To do so he must show that the seller's performance diverged from what has been agreed upon by the parties, or that the product did not possess the characteristics as mentioned in the latter part of § 434 BGB. The German law distinguishes several instances of defects which demand different specificity of proof in order to be able to convince the judge about the existence of defects. These instances of defects are: *Sachmangel*, *Grundmangel*, and *Folgemangel*. Chapter five includes the detailed description of the above terms. As a result of the above categories of defects it is not always equally easy to provide evidence as to the existence of defects. In many complex cases, the consumer is required to provide specific evidence that often seems overly burdensome, in particular, in cases of *Grundmangel* and *Folgemangel*. When the consumer succeeds in proving the existence of defects within six months from the time of the passing of risk, the burden of proving the contrary shifts to the seller. Accordingly, to rebut the presumption the seller must prove that the goods were free of defects at the time of the passing of risk or that the defects occurred only after the risks passed to the consumer. § 476 implements the exclusion criteria in light of the Directive. As a result the presumption of non-conformity does not apply when it is incompatible with the nature of the goods or the nature of the defects. There is uncertainty over the scope of incompatibility. It mainly regards the sale of second-hand goods and the sale of



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animals. This uncertainty, together with the complex proof of the existence of defects, leads to the application of the presumption of non-conformity being difficult and ambiguous at times. In some circumstances, in order to benefit from the presumption of non-conformity, a German consumer has a heavier burden of proof than consumers in other jurisdictions.

The English legislator introduced the presumption of non-conformity in the Sale of Goods Act 1979, through Part 5A section 48A (3) and (4) of the Sale and Supply of Goods to Consumers Regulations 2002, which states that the goods which do not conform to the contract of sale at any time within the period of six months starting on the date the goods were delivered to the buyer must be presumed to have not conformed at that date, unless it is established that the goods did conform at that date or its application is incompatible with the nature of the goods or the nature of the lack of conformity. To make use of the presumption, a consumer claiming that the goods lack conformity must prove a breach of an express term or a breach of one of the implied terms from Sections 13-15 of the Sale of Goods Act 1979. The lack of conformity must have become apparent within six months from the time of delivery. The proposed Consumer Rights Bill regulates the implied terms in sections 9, 10, 11, 13, 14 and the presumption of non-conformity in section 19 (14) and (15). As with the other jurisdictions, the presumption of non-conformity can be rebutted. The English law also contains the exclusion criteria implemented in light of the Directive. In practice, although being implemented in light of the Directive, the presumption of non-conformity has marginal importance. There is no case law regarding the application of the presumption and no detailed interpretation of the provisions can be found in the literature. Chapter five discusses the reasons for this situation and sketches its possible consequences for the resolution of consumer disputes and for the level of consumer protection.

The Dutch legislator implemented the presumption of non-conformity in Article 7:18 (2) BW. As with the Directive and other jurisdictions, a consumer to be able to benefit from the presumption must provide evidence of the existence of the non-conformity within six months from the time of delivery. According to the case law, the proof of the existence is relatively easy, however, there are many cases when the application of the presumption was denied. When successful, the seller bears the burden of proving the lack of non-conformity at the time of the delivery. Initially it has been suggested that providing sufficient doubt is enough to rebut the presumption and render the presumption untenable. This view was rejected by the Dutch courts who stated that the seller must provide full evidence to the contrary, showing that the goods were free from defects/non-conformity at the time of delivery or that the non-conformity appeared at the later stage in order to rebut the presumption of non-conformity. Accordingly, the rebuttal is the only element of the presumption which is interpreted identically in the jurisdictions investigated. Furthermore, Article 7:18 (2) BW provides the exclusion criteria, stating that the presumption cannot apply when it is incompatible with the nature of the goods or the nature of the non-con-

formity. There is considerable uncertainty regarding the scope of the exclusion criteria. The case law although rich does not sufficiently clarify the existing problems. In particular, in cases of the sale of animals, perishable goods, and second-hand goods there are many unresolved issues. They mainly regard the delimitation of the exclusion criteria. Furthermore, there is uncertainty over the relationship between the successful evidence proving the existence of non-conformity, unsuccessful rebuttal and the possibilities of the exclusion.

Chapter five contains a detailed analysis of the national approaches to the above topics and questions. It highlights the most common problems in the jurisdictions investigated, but also tries to find common elements which could have been simplified at the European or national level. The discussion found in chapter five confirms the importance of the burden of proof for the resolution of the consumer disputes in general, and the great importance of the presumption of non-conformity for the resolution of consumer disputes in particular.

**Chapter six** contains comparative conclusions and final remarks. It presents the results of the comparative study on the burden of proof in consumers sales based on the Consumer Sales Directive and its national implementations in four Member States: Poland, Germany, England and Wales and the Netherlands. As to the conditions for the application of the presumption, the existence of non-conformity within six months of the delivery, in theory, the first condition (the existence of non-conformity) is alike for all the jurisdictions investigated. In practice, there are considerable differences in how the notion of non-conformity is defined, interpreted and applied. Regarding the length of the statutory period for the application of the presumption there were originally very few differences between the Member States. In December 2014 the Polish amendments to the consumer sales law entered into force. They provide the extension of the period for the presumption up to one year following the time of the passing of the risk, which considerably improves the level of protection. Regarding the rebuttal, all the jurisdictions investigated eventually agreed that in order to rebut the presumption of non-conformity the seller must provide full and positive evidence to the contrary. However, there are still possible differences with respect to the assessment and evaluation of evidence. As to the exclusion of the presumption, all Members States except Poland implemented the exclusion criteria (the incompatibility with the nature of the goods and the nature of the non-conformity) in accordance with Article 5 (3) of the Consumer Sales Directive. The interpretation of the incompatibility with the nature of the goods and the nature of the non-conformity is to some extent alike and inconsistent in a similar way. There is uncertainty regarding the precise application and interpretation of the criteria for the exclusion of the presumption of non-conformity. Finally, there is uncertainty regarding the exact relationship between the successful evidence to the contrary, unsuccessful rebuttal and the exclusion criteria.

